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No. 85-920

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

ALASKA AIRLINES, INC., *et al.*,
Petitioners,

v.

WILLIAM E. BROCK, SECRETARY OF LABOR, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PETITIONERS

WILLIAM T. COLEMAN, JR.
Counsel of Record
DONALD T. BLISS
JOHN H. BEISNER
REBECCA K. TROTH
JAMES P. NEHF
O'MELVENY & MYERS
1800 M Street, N.W.
Washington, D.C. 20036
(202) 457-5325

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTIONS PRESENTED

In this case, the United States Court of Appeals for the District of Columbia Circuit announced an unprecedented standard for determining whether the unconstitutional portion of a statutory provision may be severed, allowing the balance of the provision to survive. The court dismissed the traditional approach of analyzing the legislative intent to ascertain whether, in the absence of the invalidated provisions, Congress would have enacted the remaining provisions as it did. Instead, the D.C. Circuit would declare the remaining portions valid unless the challenging party can prove that Congress would have preferred *no* legislation in the subject area at all. The questions thus presented are:

1. Did the D.C. Circuit err by establishing a severability standard that would allow the remaining statutory provisions to survive despite their conceded inconsistency with congressional intent and notwithstanding substantial evidence that Congress would have enacted different statutory provisions had it known that a certain portion was invalid?

2. Did the court of appeals err in holding that a legislative veto provision in the employee protection provision of Section 43 of the Airline Deregulation Act of 1978, 49 U.S.C. app. § 1552 (1982), is severable from the remainder of that section simply because the court concluded that Congress would have preferred some legislation on the subject to no employee protection at all?

PARTIES TO THE PROCEEDINGS

Petitioners are Alaska Airlines, Inc.; American Airlines, Inc.; Capitol Air, Inc.; Delta Air Lines, Inc.; The Flying Tiger Line, Inc.; Midway Airlines, Inc.; Northwest Airlines, Inc.; Ozark Air Lines, Inc.; Piedmont Aviation, Inc.; Trans World Airlines, Inc.; United Airlines, Inc.; USAir, Inc.; Western Air Lines, Inc.; and Wien Air Alaska, Inc.*

Respondents are William E. Brock, individually and as Secretary of Labor (as successor in office to Raymond J. Donovan); United States Department of Labor; the United States of America; and the following intervenors: Air Line Pilots Association, International; Association of Flight Attendants; Brotherhood of Railway and Airline Clerks; Flight Engineers' International Association; International Association of Machinists and Aerospace Workers; and Transport Workers Union of America.

Amici are Air Florida; Air One, Inc.; Arrow Air, Inc.; Empire Airlines; People Express Airlines, Inc.; and Southwest Airlines Co.

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* In accordance with Supreme Court Rule 28.1, the parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates of petitioners are set forth in Appendix D to the Petition for a Writ of Certiorari, filed November 27, 1985.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals, reversing the district court, is reported at 766 F.2d 1550 (D.C. Cir. 1985), and appears at Appendix ("App.") A (1a).[1] The opinion of the district court is reported at 594 F. Supp. 92 (D.D.C. 1984), and appears at App. B (30a).

JURISDICTION

The opinion and judgment of the court of appeals was entered on July 16, 1985. The court of appeals denied petitioners' petition for rehearing and suggestion for

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[1] By order of this Court, no joint appendix has been printed herein. *See* 54 U.S.L.W. 3662 (U.S. Apr. 7, 1986). Relevant opinions and other portions of the record below were included in petitioners' Appendix to their Petition for a Writ of Certiorari, filed November 27, 1985. Citations to material printed in that Appendix appear as "——a."

rehearing en banc on September 11, 1985. The petition for a writ of certiorari was granted on March 3, 1986. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1982).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

United States Constitution, Article I, Section 1.

United States Constitution, Article I, Section 7, Clauses 2 and 3.

Section 43 of the Airline Deregulation Act of 1978, 49 U.S.C. app. § 1552 (1982).

Department of Labor regulations under Section 43 of the Airline Deregulation Act of 1978, 48 Fed. Reg. 52,854-65 (1983).

The constitutional provisions, statutes and regulations involved are reprinted in App. C (38a).

STATEMENT OF THE CASE

A. Statutory Background

In 1978, Congress passed the Airline Deregulation Act (hereinafter "Deregulation Act" or "Act"), thereby phasing out economic regulation of domestic aviation to encourage competitive fares, new airline entrants and expanded service. *See* Pub. L. No. 95-504, 92 Stat. 1705 (1978) (codified in scattered sections of 49 U.S.C. app. (1982)). With the sunset of the Civil Aeronautics Board ("CAB") in 1984 and the transfer of its few remaining regulatory functions to the Department of Transportation ("DOT"), this transition to a deregulated industry is now largely complete.

Congress anticipated that deregulation would result in an expanded airline industry with increased employment, S. Rep. No. 631, 95th Cong., 2d Sess. 113, 115 (1978) (hereinafter "Senate Report"), a prediction

proved correct over the past eight years.[2] At the time the Deregulation Act was passed, however, a few expressed uncertainty on this score. Thus, as insurance against the "theoretical possibility" that some employees might lose their jobs as a direct result of deregulation, *id.* at 113, Congress authorized an employee protection program ("EPP") that would provide certain benefits for "protected employees" (*i.e.*, employees who as of October 24, 1978, had at least four years of employment with a CAB-certificated interstate airline). Section 43(h)(1), 49 U.S.C. § 1552(h)(1) (1982).

The employee protection provisions proposed by the House were based upon existing transportation industry programs under which benefits were supplied to displaced workers by the employers responsible for the job loss (*e.g.*, as a result of a route termination or a merger). *See* H.R. 8813, 95th Cong., 1st Sess. (1977). The EPP ultimately enacted as Section 43, however, originated in the final Senate bill and was a significant departure from the House's traditional approach. Section 43 required the Department of Labor ("DOL") to establish a novel, untested type of labor protection through a single program with two "closely linked components." 594 F. Supp. at 93 (31a); *see* S. 2493, 95th Cong., 2d Sess. § 22 (1978). Under the first part, if an air carrier experienced severe work force contractions or bankruptcy as a result of deregulation, the carrier's furloughed or terminated "protected employees" were entitled to federally-provided monthly assistance payments and other monetary benefits. *See* Section 43(a), (b), (c), 49 U.S.C. app. § 1552(a), (b), (c) (1982). The second portion of the EPP imposed on airlines certificated by the CAB as of October 24, 1978 ("covered car-

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[2] In 1984, there were 95 certificated airlines, double the number in 1978, U.S. Bureau of the Census, *Statistical Abstract of the United States: 1986* at 616 (106th ed. 1986), and industry employment has increased as well. S. Morrison and C. Winston, *The Economic Effects of Airline Deregulation* 44 (Brookings Inst. 1986).

riers") a duty to hire "protected employees" who were terminated or furloughed by competing airlines.[3] *See* Section 43(d), 49 U.S.C. app. § 1552(d) (1982).

Given congressional uncertainty about the need for labor protection in addition to that already provided by the CAB and about Section 43's inherent inconsistency with the Act's otherwise deregulatory purpose, Congress did not fully develop the EPP. In Section 43(f), Congress directed DOL, a department not otherwise involved in airline deregulation, to promulgate EPP regulations, but it imposed on that delegation a one-house veto and unusually elaborate procedures to ensure ongoing congressional control over the program's evolution. The veto provision, which was not subject to any severability clause, was woven directly into Section 43(f)'s delegation to DOL and applied exclusively thereto. It was the only legislative veto provision in the entire Deregulation Act, which contains numerous other delegations of authority.

The one-house veto provision had always been an integral part of the Senate provision, which expressly provided for a sixty "legislative day" review period to allow either house to disapprove any DOL regulations. Even as it was deleting an unrelated veto provision elsewhere in the Act, however, the Conference Committee strengthened the veto provision in Section 43(f) by adding two more restrictions to the delegated authority. First, it required DOL to promulgate its regulations within six months after the Deregulation Act became law. Second, the Conference bill instructed DOL to submit its proposed rules to the aviation oversight committees in both the House and Senate for a review period of thirty legislative days.[4]

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[3] Since many carriers have been certificated since 1978, these duty-to-hire obligations apply only to some of the certificated carriers now operating.

[4] These committees are the Senate Committee on Commerce, Science, and Transportation and the House Committee on Public Works and Transportation. *See* 49 U.S.C. app. § 1552(f)(3) (1982).

Section 43(f) (2), (3), 49 U.S.C. app. § 1552(f) (2), (3) (1982). With the veto as the ultimate check, each of these provisions would have strengthened Congress' ability to control and shape the specific dimensions of the EPP.

In March 1979, DOL proposed regulations to implement both the government compensation and airline duty-to-hire aspects of the EPP. *See* 44 Fed. Reg. 19,146 (1979). DOL submitted final rules to Congress on January 19, 1981, but withdrew them on February 3, 1981. Then, on November 22, 1983, five years after the statutory deadline, *see* 48 Fed. Reg. 52,854 (1983), and only a few months after this Court declared legislative veto provisions unconstitutional, *see Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983), DOL published the final regulations now at issue in this case. Unlike the March 1979 proposal, however, these new DOL regulations attempted to implement only the duty-to-hire portion of the EPP. The government compensation guidelines mandated by Section 43(f) were deleted, placing the entire burden of the EPP solely on the "covered carriers," which account for only about one-third of the DOT-certificated airlines operating today.[5]

Although Congress' intention was to provide protections for employees adversely affected by deregulation, DOL's regulations would establish a preferred class of "designated employees," which includes employees who are terminated or furloughed for any reason other than cause, even if the reason is totally unrelated to deregulation. *See* 48 Fed. Reg. at 52,862. Under the regulations, the "covered carriers" have a mandatory obligation to hire these "designated employees" for any job vacancies (including safety-sensitive positions, such as pilots, flight

[5] DOL still has not proposed any regulations to implement the government compensation provisions of Section 43, and although the statute itself authorized appropriations for this part of the program, *see* Section 43(g), 49 U.S.C. app. § 1552(g) (1982), DOL has not requested that such appropriations be made.

attendants, and mechanics) before considering any other job applicants, even those who are better qualified.[6] Before becoming effective, these regulations were submitted to Congress, but not until several years after the six-month deadline, *see* 49 U.S.C. app. § 1552(f)(2), and not until after Congress' authority to veto had been voided in *Chadha*.

B. Proceedings Below

In February 1984, petitioners brought this action against DOL and shortly thereafter moved for summary judgment, urging that Section 43's legislative veto provision was unconstitutional and that Section 43 should be invalidated in its entirety. DOL and several labor union intervenors then filed cross-motions for summary disposition.[7] On May 18, 1984, the district court (Hon. Gerhard A. Gesell) granted plaintiffs' summary judgment motion. Noting that the invalidity of the veto provision was not contested, the court stated that the only issue before it was whether the invalid veto could be severed or whether Section 43 must fall in its entirety. Judge Gesell concluded that this issue turned

> not [on] whether Congress would have enacted *some* type of employee protection plan in the absence of a legislative veto provision; rather, the issue is whether Congress would have enacted the *same* statute. If not, the Court cannot enforce the re-

[6] The regulations also impose a variety of new notification and reporting requirements. *See* 48 Fed. Reg. at 52,863-64. Further, the rules require covered carriers to wait at least thirty days before filling any job vacancy with an applicant who is not a designated employee, regardless of whether any such employees have applied or are available and without any exception for safety-related positions that must be filled immediately. *See id.* at 52,863, § 220.24.

[7] Intervenors are Air Line Pilots Association, International ("ALPA"); Association of Flight Attendants; Brotherhood of Railway and Airline Clerks; Flight Engineers' International Association; International Association of Machinists and Aerospace Workers; and Transport Workers Union of America (the latter four hereinafter collectively referred to as "BRAC").

> mainder of the statute merely because it might be an approximation of what Congress would have enacted. The task of determining the most preferable alternative to an unconstitutional statute belongs not to the courts, but to Congress itself.

594 F. Supp. at 94 n.3 (33a-34a n.3) (emphasis in original). Based on "the content and structure of the . . . Act, the circumstances surrounding its enactment, and its legislative history," the Court held Section 43 invalid in its entirety, finding that the invalid veto provision "is inextricably bound to the remainder of that section and that Congress would not have enacted the remainder of [Section] 43 in its absence." *Id.* at 96 (37a) (footnote omitted).[8]

On July 16, 1985, the court of appeals reversed, setting forth a different, unprecedented standard under which the legislative veto provision was found to be severable from the balance of Section 43. Instead of asking whether Congress would have enacted the remaining provisions of Section 43 as it did if it had known the one-house veto was unconstitutional, the court declared that the remaining parts of the statute must be held valid unless "the challengers . . . show that it is evident that Congress would have preferred no airline employee protection provision at all to the existing provision *sans* the veto provision." 766 F.2d at 1561 (19a). *See also id.* at 1560 (18a), 1563 (25a), 1564 (26a) and 1565 (28a).

Pursuant to this standard, the court of appeals dismissed as irrelevant considerable evidence that the veto provision was an integral limitation on DOL's delegated authority and that Congress would not have enacted the remaining provisions in the form it did absent the veto. Such evidence, the court concluded, does not "speak to whether Congress would have preferred no employee pro-

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[8] The district court, however, found that Section 43 was severable from the balance of the Deregulation Act. 594 F. Supp. at 96 n.5 (37a n.5).

tection plan at all . . . ." *Id.* at 1563 (25a); *see also id.* at 1565 (28a). As a result, based on the general observation that Congress "desire[d] to provide for airline employee protection," the court declined to nullify Section 43 in its entirety. *Id.* at 1561 (19a).[9]

After denying petitioners' motion for rehearing, suggestion for rehearing en banc, and motion to stay the mandate pending Supreme Court review, the court released its mandate on October 9, 1985.[10] After petitioners filed a petition for writ of certiorari on November 27, 1985, DOL published notice that its regulations would become effective on January 27, 1986. *See* 50 Fed. Reg.

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[9] Pursuant to 28 U.S.C. § 1252 (1982), BRAC filed a direct appeal and application for a stay of judgment pending appeal in the Supreme Court of the United States. On May 23, 1984, Chief Justice Burger, acting as Circuit Justice, denied BRAC's stay application, and BRAC later withdrew the appeal before the Supreme Court determined whether it had exclusive jurisdiction.

[10] The court of appeals also remanded the case to the district court for consideration of other grounds on which petitioners had challenged the statute and regulations. On remand, the district court ruled on January 22, 1986 that § 220.21(a)(1) of the regulations, which prohibits airlines from imposing initial minimum hiring age requirements for pilots and flight crew, was invalid because DOL failed adequately to address its impact on airline safety. Concluding that "the Airlines' concern [in this regard] is a substantial one," *Alaska Airlines, Inc. v. Brock*, No. 84-0485, slip op. at 13 (D.D.C. Jan. 22, 1986), the district court remanded that issue to the Secretary of Labor for further consideration. *Id.* at 13-14. The remaining sections of the regulations were found to be valid. On January 23, 1986, petitioners filed a notice of appeal and a motion to stay the effective date of the regulations pending appeal of the district court's determination on the remaining sections of the regulations. The district court denied the stay motion on January 24, 1986, and similar motions were denied by the court of appeals and the Chief Justice (acting as Circuit Justice) on January 25 and January 27, respectively. On February 7, 1986, ALPA filed a notice of cross-appeal. These actions are now pending in the court of appeals.

53,094 (1985). The Court granted a writ of certiorari on March 3, 1986.[11]

SUMMARY OF ARGUMENT

The D.C. Circuit formulated in this case a completely new standard for determining whether a statutory provision should survive when integral parts thereof are declared unconstitutional. Under that test, an invalid portion of a statute may be severed unless it is proved "that Congress would have preferred no [statute] at all to the existing provision *sans* the veto provision." 766 F.2d at 1561 (19a). Applying this standard, the court of appeals concluded that the employee protection provisions in Section 43 of the Deregulation Act should survive the invalidation of its legislative veto portion even though there is no reason to believe that absent the veto, Congress would have adopted the remaining parts of the section and the substantial and unguided regulatory discretion they allow.

The severability issue in this case is not, as the court of appeals approached it, whether Congress would have enacted some form of protection for airline employees without retaining a veto power over DOL's program. *See* 766 F.2d at 1560 (18a), 1561 (19a), 1563 (25a), 1564 (26a), and 1565 (28a). Petitioners do not dispute that Congress wanted a limited "insurance" program for airline employees harmed by deregulation or that some type of employee protection probably would have been enacted without a veto. Under a chain of decisions unbroken over fifty years, however, the relevant issue is whether Congress would have enacted *this* employee protection program, delegating to DOL the general authority

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[11] Following the issuance of a writ of certiorari on March 3, 1986, the court of appeals recalled its mandate pending review in this Court, and DOL suspended its program. On motion by DOL and ALPA, the court of appeals then reissued its mandate on May 9, 1986.

it did, without the ultimate check of a legislative veto to ensure considerable congressional control over and involvement in DOL's development of the program. *See, e.g., Champlin Refining Co. v. Corporation Commission*, 286 U.S. 210, 234 (1932).

The D.C. Circuit's new test was prompted by a manifest eagerness to decide this case with a mechanical formula, negating the need for a careful analysis of legislative intent. But the test defies logic, setting such an exacting standard that severability is the pre-ordained result. Moreover, by allowing judicial reconstruction of the statute without regard to the will of Congress, the test violates the constitutionally-mandated separation of powers. *See, e.g., Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 944-51 (1983). It improperly allows a court freely to sever invalid provisions, leaving on the books anything that in the court's view vaguely advances a broad congressional purpose. Further, as is the case here, the statutes which survive under this standard may improperly grant a delegation of authority broader than Congress itself enacted or would have permitted. *See, e.g., Davis v. Wallace*, 257 U.S. 478, 484 (1922). The use of this erroneous standard caused the court below to disregard valid evidence that under this Court's traditional analysis would have demonstrated inseverability. For example:

(1) In mandating airline deregulation in 1978, Congress anticipated expanded employment in that industry. Nevertheless, as an "insurance policy" against any job contractions, Congress ultimately authorized an EPP. Because of uncertainty about the need for such a program and because interest in employee protection arose late in the Deregulation Act's evolution, however, Congress left essential aspects of the EPP undefined. Responsibility for proposing a specific design of the program was delegated to the administrative process, but only with the guarantee that each house of Congress would

have multiple opportunities for detailed involvement in molding the program and the ultimate power to veto whatever DOL proposed.

(2) The House deregulation bill provided for labor protections traditionally used in transportation industries, providing benefits to employees of specific firms affected by certain government-approved private transactions (*e.g.*, mergers). In contrast, the provisions in the Senate bill were more pervasive, creating an industry-wide EPP that was not limited to particular transactions. Further, the Senate bill (a) promised an undefined amount of federally-provided monthly assistance payments and (b) required covered carriers to give hiring priorities to employees terminated by competing carriers.[12] Because the EPP provisions authorized potentially significant government expenditures and imposed heavy regulatory burdens on certain air carriers, contradicting the overall deregulatory purpose of the Deregulation Act, Congress reserved the veto power over DOL's regulations.

(3) Among the numerous delegations of administrative authority in the Deregulation Act, implementation of the EPP was the only responsibility given to DOL. That department's dedication to deregulation was open to doubt, and DOL was not within the jurisdiction of the congressional committees charged with airline industry oversight. Thus, the veto provision ensured congressional control over the proposals of an agency not otherwise involved in airline deregulation.

(4) In choosing the Senate EPP over the House version, the Conference Committee failed to resolve key elements of the program but retained for each house the legislative veto. This action is highly significant be-

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[12] As noted previously, however, the burdens of the program were placed only on certain carriers. *See supra* at 3.

cause the Committee simultaneously struck a legislative veto provision elsewhere in the Act, leaving Section 43 as the only one of many delegations of authority in the lengthy, complex Deregulation Act subject to veto power. In addition, the Conference Commitee substantially strengthened the control of each house over the development of the EPP by adding two additional legislative review procedures. The Conference bill instructed DOL to follow a three-step procedure: (a) promulgate regulations within six months, (b) submit its proposed rules to the congressional committees responsible for aviation oversight for thirty legislative days, and (c) delay the effective date of its final rules for an additional sixty legislative days to allow either house of Congress to veto them. In persuading the House to acquiesce in the Senate approach, Rep. Levitas, a principal architect of the Act, confirmed that Congress would "have the final word on the regulations." 124 Cong. Rec. H13,448 (daily ed. Oct. 14, 1978).

(5) As the court of appeals observed, this three-step review "provision reflects, as a whole, a unique combination of features" among the over 200 legislative veto provisions Congress has included in various statutes. 766 F.2d at 1563 (25a). Other statutes may contain some of these review steps, but Section 43 is distinctive in that it contains all three. Significantly, these provisions (including the veto) are integral and exclusive parts of the same subsection which delegates regulatory power to DOL. Thus, having left unresolved essential elements of the program, Congress designed an extensive and unprecedented review process that would guarantee each house maximum control over the EPP's design and implementation.

By adopting a severability standard that obviated the need for careful examination of all circumstances sur-

rounding the passage of Section 43, the court of appeals disregarded these and other relevant factors. The language, structure and purpose of Section 43 as well as its legislative history demonstrate that Congress would not have granted DOL the power to implement this broad, untested form of employee protection in the form it did without retaining a legislative veto. To permit the remaining provisions of Section 43 to remain in force, without the veto, is to permit, as the government concedes, a statute with language and effects not intended by Congress. DOL Br. in Opp. at 11. The veto provision is thus inseverable from Section 43.[13]

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[13] The court of appeals also improperly rejected petitioners' contention that the appeal of the district court's decision should have been brought directly in the Supreme Court, not the court of appeals. *See* 766 F.2d at 1554-56 (6a-9a). Under 28 U.S.C. § 1252, the Supreme Court has jurisdiction over appeals from district court decisions holding federal statutes unconstitutional in civil actions to which the government is a party. Since Judge Gesell held Section 43 unconstitutional in its entirety, *see* 594 F. Supp. at 96 (37a), and the other conditions of Section 1252 were met, the Supreme Court had exclusive jurisdiction over the appeal. *See Donovan v. Richland County Assn. for Retarded Citizens*, 454 U.S. 389 (1982). The court of appeals lacked jurisdiction, and for that reason alone, that court's decision must be vacated. *Id.* at 390.

This Court refused to accept jurisdiction in another legislative veto case, *EEOC v. Allstate Insurance Co.*, 104 S. Ct. 3499 (1984), but it gave no reasons. The issue presented there, however, is distinguishable because it involved a challenge to the *remedy* ordered by the district court, not a challenge to the court's holding that the statute in question was unconstitutional. *See id.* at 3499 (Burger, C.J., dissenting). Appellants below did not merely appeal the remedy ordered by Judge Gesell, but instead directly challenged his conclusion that Congress' attempt to share with the Executive the responsibility for shaping an EPP was so

ARGUMENT

I. THE COURT OF APPEALS ADOPTED AN IMPROPER STANDARD FOR DETERMINING SEVERABILITY.

A. The D.C. Circuit's Severability Analysis Contravenes Long-Standing Precedent.

Since 1932, this Court has determined the severability of invalid statutory provisions under one standard: If a portion of a statutory section is declared unconstitutional, the entire section must fall if "it is evident that the legislature would not have enacted *those provisions* which are within its power, independently of that which is not." *Champlin Refining Co. v. Corporation Commission*, 286 U.S. 210, 234 (1932) (emphasis added). *See, e.g., United States v. Jackson*, 390 U.S. 570, 585 (1968) (quoting and applying *Champlin Refining*); *Tilton v. Richardson*, 403 U.S. 672, 684 (1971) (same); *Buckley v. Valeo*, 424 U.S. 1, 108 (1976) (same); *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 931-32 (1983) (same); *Zobel v. Williams*, 457 U.S. 55, 64 (1982) (citing *Champlin Refining*); *Hooper v. Bernalillo County Assessor*, 105 S. Ct. 2862, 2869 (1985) (same).[14] In

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intertwined with the other portions of Section 43 that the entire section was unconstitutional. *See* DOL App. Br. at 1-2. This Court has recognized that if an entire statute is invalidated because it contains an unconstitutional part, the constitutionality of the *entire statute* is at issue. *See, e.g., Chadha*, 462 U.S. at 931 (issue is whether "§ 244 in its entirety is violative of the Constitution"). This case, therefore, is squarely within the scope of Section 1252.

[14] Prior to the decision herein, the federal courts of appeals, including the D.C. Circuit, consistently applied this standard, particularly where the severability of an invalid legislative veto provision was at issue. For example, in two relatively recent legislative veto cases, the D.C. Circuit noted that " 'the crucial inquiry [is] whether Congress would have enacted other portions of the statute in the absence of the invalidated provision.' " *American Federation of Government Employees v. Pierce*, 697 F.2d 303, 307 (D.C. Cir.

other words, a statutory section containing an invalid provision must fall in its entirely if it appears that absent the invalid part, Congress would have enacted *either* no provision at all *or* one with different form, content or language.

Applying the *Champlin Refining* standard, the district court herein had no doubt that the legislative veto provision in Section 43 was inseverable, finding it readily apparent from the Deregulation Act's "content and structure," legislative history, and surrounding circumstances that Congress would not have enacted the other parts of Section 43 without the veto provision. 594 F. Supp. at 96 (37a). On review, the court of appeals introduced its severability analysis with the same *Champlin Refining* standard. *See* 766 F.2d at 1559 (16a). But immediately thereafter, the court abandoned that approach, embracing a radically different standard that led inexorably to reversal of the decision below. The court declared repeatedly that those arguing for inseverability had the burden of showing "that Congress would have preferred no airline employee protection provision at all to the existing provision *sans* the veto provision." *See*

1982) (quoting *Consumer Energy Council of America v. FERC*, 673 F.2d 425, 442 (D.C. Cir. 1982), *aff'd mem. sub nom. Process Gas Consumers Group v. Consumer Energy Council of America*, 463 U.S. 1216 (1983)). *See also EEOC v. CBS, Inc.*, 743 F.2d 969, 971 (2d Cir. 1984) (issue is "whether Congress would have delegated to the President the broad reorganizing authority granted him by the Act without reserving for itself [a] one-house veto"); *Muller Optical Co. v. EEOC*, 743 F.2d 380, 387-88 (6th Cir. 1984) (issue is "whether Congress would have passed the statute absent the offending [legislative veto] provision"); *EEOC v. Hernando Bank, Inc.*, 724 F.2d 1188, 1190 (5th Cir. 1984) (issue is "whether Congress would have enacted the remainder of the statute in the absence of the invalid [legislative veto] provision"); *McCorkle v. United States*, 559 F.2d 1258, 1262 (4th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978). *See also Rhode Island Federation of Teachers v. Norberg*, 630 F.2d 855, 863 (1st Cir. 1980) (issue is "whether the legislature would have enacted [the valid portion] independently of the [unconstitutional portions]").

id. at 1561 (19a). *See also id.* at 1563 (25a), 1564 (26a) and 1565 (28a).

This cannot be the proper test. The standard is not only unprecedented,[15] it is wholly illusory, supplying no meaningful guidance. It amounts to little more than a tautological inquiry into whether Congress wanted to enact a statute on the subject, a non-probative fact readily apparent from the statute's existence. But more fundamentally, the test blithely ignores the tenet underlying all severability analysis: "What was the intent of the lawmakers?" *Carter v. Carter Coal Co.*, 298 U.S. 238, 312 (1936).

The required inquiry is whether "the legislature would have been satisfied *with what remained.*" *Champlin Refining*, 286 U.S. at 235 (emphasis added).[16] Yet, the

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[15] In its decision, the D.C. Circuit relies upon a severability analysis articulated by the Temporary Emergency Court of Appeals in *Gulf Oil Corp. v. Dyke*, 734 F.2d 797 (Temp. Emer. Ct. App.), *cert. denied*, 105 S. Ct. 173 (1984). But the court in *Gulf Oil* did not hold the statute severable exclusively on the theory that Congress would have preferred the modified version to nothing at all. Based on an examination of the legislative history, the court first held that the statutes under review (two energy policy acts) would have been enacted without the veto provisions. *See* 734 F.2d at 804. In contrast, the D.C. Circuit in this case asked only whether Congress would have preferred no employee protection at all if it could not have retained a veto power, failing even to consider whether Congress would have enacted this *particular* statutory section (and its broad delegation to DOL) had it known that the legislative veto device would not be available as a limitation on that delegation. Moreover, unlike the *Gulf Oil* case in which plaintiffs sought invalidation of the entire scheme of federal oil price regulation as embodied in two comprehensive acts, the issue here is whether the legislative veto can be severed from the statutory section to which it exclusively applied, leaving the rest of the Deregulation Act intact.

[16] Or as expressed in a decision rendered the same day as *Champlin Refining*, if a court concludes "that the legislature would not have been satisfied with the statute unless it had included the invalid part," it must hold the law to be nonseverable. *Utah Power & Light Co. v. Pfost*, 286 U.S. 165, 184-85 (1932).

D.C. Circuit's approach considers legislative intent in only the broadest possible terms, merely making a simplistic examination of whether the challenged statute is "important" and evading the real issue of precisely what (if anything) Congress would have wanted to survive partial invalidation. DOL Br. in Opp. at 8.

As the district court observed, this analysis permits courts to "enforce the remainder of [a] statute merely because it might be an approximation of what Congress" had in mind. 594 F. Supp. at 94 n.3 (34a n.3). For example, in this case, Congress delegated authority to DOL with explicit limitations (*e.g.*, the legislative veto). But as the Secretary of Labor concedes, DOL Br. in Opp. 11, by removing the veto limitation, the D.C. Circuit has expanded DOL's authority beyond Congress' original grant. Under *Champlin Refining*, the controlling question is whether Congress would have been willing to confer such expanded power on DOL had it known that the veto provision it purposefully and specifically imposed on the delegation of authority was invalid. The D.C. Circuit's standard, however, obviates any inquiry into that issue and thus improperly allows the judiciary to reformulate statutes to create laws which are not at all what Congress contemplated. *See, e.g., Sloan v. Lemon*, 413 U.S. 825, 834 (1973) (severability not permitted where the remaining provisions would "create a program quite different from the one the legislature actually adopted"); *Washington v. United States*, 460 U.S. 536, 543 n.7 (1983) (discussing *Moses Lake Homes, Inc. v. Grant County*, 365 U.S. 744, 752 (1961)); *Carey v. Population Services International*, 431 U.S. 678, 708-09 n.2 (1977) (Powell, J., concurring and concurring in judgment) (quoting *Sloan*).

B. The Severability Standard Used Below Violates The Constitutionally-Required Separation Of Powers.

Once a court has performed its singular duty of determining whether a particular statute contravenes the Constitution, it should stop. *See TVA v. Hill*, 437 U.S.

153, 194-95 (1978) (citations omitted) (Once the "constitutionality [of a statute is] determined, the judicial process comes to an end. . . . [T]he commitment to the separation of powers is too fundamental for us to preempt congressional action by judicially decreeing what accords with 'common sense and the public weal.'"). Rejecting as irrelevant evidence that Congress would not have enacted the remaining portions of Section 43 as it did without the invalidated provisions, 766 F.2d at 1560-65 (15a-28a), the court below sought to preserve the balance of the section because generally "Congress had a strong humanitarian desire to provide for airline employee protection." *Id.* at 1561 (19a). But a court should not strain to preserve a partially invalid statute merely because it believes something is "better than nothing."

If from all indicia it appears that congressional preference would have been for a law other than that which would remain after severance, the responsibility for remedial legislative action should be left where it belongs—with the legislature. *See, e.g., Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88 n.40 (1982) ("it is for Congress to determine the proper manner of restructuring the [invalidated statute] . . . in the way that will best effectuate the legistive purpose").[17] If Congress wishes to reinstate a statute, it can do so.[18] But Congress should not have to be

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[17] *See also Califano v. Westcott*, 443 U.S. 76, 94-95 (Powell, J., concurring in part and dissenting in part) ("[The Court] should not use its remedial powers to circumvent the intent of the legislature. . . . Rather than . . . rewriting [the statute], we should leave this task to Congress."), *aff'd on rehearing*, 443 U.S. 901 (1979); *Regan v. Time, Inc.*, 104 S. Ct. 3262, 3290 (1984) (Powell, J., concurring in part and dissenting in part) ("[O]ne may assume that Congress—if necessary—would move promptly to enact a more carefully drawn statute.").

[18] For example, after the Second Circuit invalidated the entire Reorganization Act of 1977, 5 U.S.C. §§ 901-912 (1982), because it

constantly vigilant for judicially-redrafted statutes and bear the burden of having to take rehabilitative action (*e.g.*, repeal or amendment) against statutory provisions which, as revised, no longer comport with legislative intent.

By authorizing the routine severance of invalid provisions without meaningful examination of whether the judicially-recast statute preserves legislative intent, the D.C. Circuit's severability standard disregards these principles, thereby raising serious separation-of-powers concerns. In its last three Terms, this Court has cautioned repeatedly that a reviewing court is not "license[d] . . . to usurp the policy-making and legislative functions of duly-elected representatives." *Heckler v. Mathews*, 465 U.S. 728, 741 (1984).

> Statutes should be construed to avoid constitutional questions, but this interpretative canon is not a license for the judiciary to rewrite language enacted by the legislature. . . . Any other conclusion, while purporting to be an exercise in judicial restraint, would trench upon the legislative powers. . . .

United States v. Albertini, 105 S. Ct. 2897, 2902 (1985).[19] Such judicial restraint is especially important in the context of severability analysis:

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contained an unconstitutional, inseverable legislative veto provision, the court stayed its action for the express purpose of giving Congress the opportunity to take remedial legislative action. *See EEOC v. CBS, Inc.*, 743 F.2d 969, 976 (2d Cir. 1984). Congress responded by reenacting the statute without the veto provision. *See* Reorganization Act Amendments of 1984, Pub. L. No. 98-614, 98 Stat. 3192 (1984). Returning partially-invalidated statutes to Congress for remedial action when the reviewing court sees a likelihood that Congress may have enacted a different statute will cause Congress to reconsider certain subjects on which it has already acted. But when such situations occasionally arise, the Court's separation-of-powers analysis makes clear that it is better to place that burden on Congress than to have the courts rewriting statutes. *See infra* at 20-21.

[19] *See also United States v. Locke*, 105 S. Ct. 1785, 1793 (1985) ("the fact that Congress might have acted with greater clarity or

> [C]ourts addressing questions of severability should be guided by Chief Justice Taft's admonition "that amendment may not be substituted for construction, and that a court may not exercise legislative functions to save [a] law from conflict with constitutional limitations." [20]

Regan v. Time, Inc., 104 S. Ct. 3262, 3275 n.2 (1984) (Brennan, J., concurring in part and dissenting in part) (quoting *Yu Cong Eng v. Trinidad*, 271 U.S. 500, 518 (1926)).[21]

Clearly, the D.C. Circuit's new severability standard is more easily applied by the courts because it eliminates the need for a painstaking inquiry into legislative intent. *See supra* at 16-17. But this approach creates the same risks of intrusion on another branch of government as does the legislative veto provision that caused the severability issue to arise here in the first place. The con-

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foresight does not give courts a *carte blanche* to redraft statutes in an effort to achieve that which Congress is perceived to have failed to do"); The Federalist No. 78, at 526 (A. Hamilton) (J. Cooke ed. 1961) (emphasis in original):

> It can be of no weight to say, that the courts on the pretence of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. . . . The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body.

[20] The published views of one member of the court of appeals panel below are inconsistent with this precept of judicial restraint (as echoed in *Chadha*) and may have influenced the result below. *Compare* Ginsburg, *Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation*, 28 Clev. St. L. Rev. 301, 324 (1979) (citations omitted) (rejecting the " 'wooden notion that each branch must "be limited to the exercise of the powers appropriate to its own department and no other" ' "), *with Chadha*, 462 U.S. at 951 (holding that the Constitution seeks "to assure, as nearly as possible, that each branch of government . . . confine[s] itself to its assigned responsibility").

[21] *See also Buckley v. Valeo*, 424 U.S. 1, 255 (1976) (Burger, C.J., concurring in part and dissenting in part).

straints on legislative activity articulated in *Chadha* should be applied no less stringently to the judiciary. As is the case with the legislative veto, the D.C. Circuit's severability standard "doubtless [is] . . . a convenient shortcut; the 'sharing' with the [judiciary] by Congress of its authority . . . is, on its face, an appealing compromise." *Chadha*, 462 U.S. at 958. But "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." *Id.* at 944. Although efficiency may be achieved by allowing a severed statute to remain on the books notwithstanding its inconsistency with legislative intent, "[t]he hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted." *Id.* at 951.[22]

The court of appeals' intrusion into the legislative sphere was prompted by its eagerness to identify presumptions that would negate the need for a probing assessment of legislative intent. The guiding principle was the court's perception that "*Chadha* presumes severability of the offensive provision if what remains after severance is fully operable as law." 766 F.2d at 1560

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[22] In *Chadha's* wake, Congress has entertained proposals for omnibus severability laws denoting which, if any, legislative veto provisions should be deemed severable. *See, e.g.*, H.R. 3939, 98th Cong., 1st Sess. (1983) (proposed "super sunset" legislation that would have repealed all authority delegations unless reinstated by Congress with or without alternative legislative veto procedures). *See also The Supreme Court Decision in INS v. Chadha and Its Implications for Congressional Oversight and Agency Rulemaking: Hearings Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. 150 (1983) (statement of Alan B. Morrison) (hereinafter "*Chadha Hearings*"). To date, however, Congress has not adopted any of these proposals. This Court's adoption of the D.C. Circuit's severability approach and its virtually insurmountable standard for inseverability, however, would effectively guarantee the severability of all legislative veto provisions, regardless of legislative intent. Thus, the Court would be acting in Congress' stead.

(17a).[23] Concluding that Section 43 would be operable without its legislative veto, the court of appeals held that to prove inseverability, those challenging Section 43 had to meet the higher burden of showing that Congress would have preferred no employee protection at all "to the existing provision *sans* the veto provision." *Id.* at 1561 (19a). But the court of appeals offered no explanation, logical or otherwise, for why the "operability" presumption should trigger this insurmountable severability standard, a test which obviates any need to examine whether Congress would have enacted the remaining provisions of the statute in the form it did had it known a portion was invalid. *Id.* Moreover, Section 43 (unlike the statute in *Chadha*) is not subject to a severability clause which "gives rise to a presumption" of severability. *Chadha*, 462 U.S. at 932. That a statute may remain "operable" after excision of an invalid provision is entirely fortuitous, providing no insight into legislative intent concerning severability.[24] The *Chadha* "operability"

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[23] The court of appeals also stated that "[o]ur charge is to save as much of the statute as we can." *Id.* at 1560 (18a) (citing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937)). But the D.C. Circuit's severability approach, preferring presumption formulas to a genuine search for legislative intent, contorts this maxim of statutory construction. As the Court made clear in *Jones & Laughlin*, 301 U.S. at 30, the charge is not to preserve Congress' *language*, but to preserve that body's *authority* to legislate without unwarranted judicial interference. To save statutes in a form inconsistent with congressional intent threatens, not preserves, the role of the legislative branch.

[24] In *Chadha*, the Court perceived a lessened need for inquiry into legislative intent because a severability clause was present, giving "rise to a presumption that Congress did not intend the validity of . . . any part of the Act . . . to depend upon whether the veto clause . . . was invalid." 462 U.S. at 932. Under such circumstances, it is not unreasonable that an invalid provision be "*further* presumed severable" if what remains after severance is workable. *Id.* at 934 (emphasis added). A presumption based solely on operability, however, is illogical when applied to a statutory

presumption is applicable only after legislative intent favoring severability is determined (*e.g.*, from a severability clause),[25] and the presumption is therefore wholly inapplicable here.[26] Moreover, in *Chadha*, even though the severability clause created a presumption of severability, the Court still examined legislative history to ascertain whether Congress would have enacted the *re-*

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provision not governed by a severability clause. The fact that a statute may still function absent its invalid provision does not speak to the real issue of whether what remains would function as Congress would have intended.

[25] None of this Court's post-*Chadha* decisions involving statutes lacking severability clauses applies or even mentions any "operability" presumption. *See Hooper v. Bernalillo County Assessor*, 105 S. Ct. 2862, 2869 (1985); *Regan v. Time, Inc.*, 104 S. Ct. 3262, 3269 (plurality opinion); *id.* at 3273-75 (Brennan, J., concurring in part and dissenting in part); *id.* at 3289-90 (Powell, J., concurring in part and dissenting in part). *Champlin Refining*, the case to which the *Chadha* presumption is attributed, *see Chadha*, 462 U.S. at 934, makes clear that post-severance "operability" is to be considered only *after* legislative intent has been assessed. *See* 286 U.S. at 234 (noting that once a legislative preference for severability is found, "the invalid part may be dropped *if* what is left is fully operative as a law" (emphasis added)).

[26] The question whether a statute is "operative" without an invalid provision is irrelevant to the severability of a legislative veto provision because a veto is by definition the capacity to negate the operation of a delegation of authority, and the removal of the veto therefore obviously would not interfere with the functioning of the delegation. In other words, "[i]t's hard . . . to envision a statutory enactment that probably couldn't be viewed as fully operative, even though the legislative veto was struck down. It would just be a different kind of operation tha[n] Congress contemplated." *Chadha Hearings*, *supra*, at 138 (remarks of Rep. Berman). In this context, allowing an "operability" presumption to be applied regardless of whether a severability clause is present would be tantamount to declaring that all legislative veto provisions are severable. Such a sweeping statement, made without any reference to legislative intent, is precisely the kind of judicial intrusion on congressional authority against which this Court has so frequently warned. *See supra* at 18-21.

maining provisions without the legislative veto. 462 U.S. at 932-34.[27]

In addressing the severability of statutory provisions which, like Section 43, are not governed by severability clauses,[28] this Court has considered carefully the legislative intent, unencumbered by mechanistic presumptions and guided by the *Champlin Refining* inquiry of whether Congress would have been satisfied with what remains

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[27] If a presumption must be applied here, it should favor inseverability. Provisions limiting the operation of a statute, such as Section 43's legislative veto provision, are likely to be inseverable because

> "by rejecting the exceptions intended by the legislature . . . the statute is made to enact what confessedly the legislature never meant. It confers upon the statute a positive operation beyond the legislative intent, and beyond what anyone can say it would have enacted in view of the illegality of the exceptions."

462 U.S. at 1014 (Rehnquist, J., dissenting) (quoting *Spraigue v. Thompson*, 118 U.S. 90, 95 (1886)). In short, when an invalid statutory provision is intended to "restrict[] a power granted by the legislature, the case against severance is strong. Otherwise, the scope of the power would be enlarged beyond the legislature's intent." *McCorkle v. United States*, 559 F.2d 1258, 1261 (4th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978) (citing *Davis v. Wallace*, 257 U.S. 478, 484 (1922)).

[28] There is no severability clause in Section 43 or in the Deregulation Act. Nor is Section 43 subject to the general severability provision enacted in 1958 as part of the Federal Aviation Act ("FAAct"), 49 U.S.C. app. § 1301 note (1982). The Deregulation Act contains numerous provisions that do expressly amend the FAAct, *see* §§ 2-40, 92 Stat. at 1705-47, as well as provisions that amend other federal statutes. *See, e.g.*, § 41, *id.* at 1748 (repealed 1982) (amending the Airport and Airway Development Act of 1970). But unlike these other provisions, the text of Section 43 of the Deregulation Act does not purport to amend the FAAct or any pre-existing federal statute. *See* "codification" note to 49 U.S.C. app. § 1552 (1982) (Section 43 was "enacted as part of the Airline Deregulation Act of 1978, and not as part of the Federal Aviation Act of 1958."). Thus, Section 43 is not part of the FAAct, and the general severability clause enacted twenty years earlier as part of the FAAct is not applicable to Section 43.

of a partially-invalidated statute. As stated in a decision this Court affirmed less than two weeks after *Chadha*:

> We think the question where the presumption lies is mostly irrelevant, and serves only to obscure the crucial inquiry whether Congress would have enacted other portions of the statute in the absence of the invalidated provision. . . . [T]he question is whether Congress would have enacted the remainder of the statute without the unconstitutional provision. . . . We do not view the imposition of any unspecified burden of persuasion on either side as beneficial to the inquiry.

Consumer Energy Council of America v. FERC, 673 F.2d 425, 442 (D.C. Cir. 1982), *aff'd mem. sub nom. Process Gas Consumers Group v. Consumer Energy Council of America*, 463 U.S. 1216 (1983) (footnote omitted).

The Court's decision in *Regan v. Time, Inc.*, 104 S. Ct. 3262 (1984), further exemplifies this well-established approach. In assessing the severability of an invalid provision of a statute governing photographic reproduction of currency, the Court was divided on the result, but the entire Court agreed that legislative intent was the key. *See id.* at 3269 (plurality opinion) ("[w]hether an unconstitutional provision is severable from the remainder of the statute . . . is largely a question of legislative intent"); *id.* at 3275 n.2 (Brennan, J., concurring in part and dissenting in part) ("severability is exclusively a question of legislative intent").[29] *See also Hooper v. Bernalillo County Assessor*, 105 S. Ct. 2862, 2869 (1985) (making no mention of presumptions and stating that the proper inquiry is "whether the . . . legis-

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[29] The plurality opinion references a general severability presumption, 104 S. Ct. at 3269, but it was not endorsed by a majority of the Court. *See id.* at 3273-89 (Brennan, J., joined by Marshall, J.); *id.* at 3289-90 (Powell, J., joined by Blackmun, J.); *id.* at 3290 (Stevens, J.). In any event, the plurality opinion did not base its conclusion on any presumption, engaging instead in the traditional search for legislative intent under the *Champlin Refining* standard. *See id.* at 3269-71.

lature *would have enacted the statute* without the invalid portion") (emphasis added); *Chadha*, 462 U.S. at 932-34.[30]

As shown in the next section, the content and structure of the Deregulation Act, the circumstances surrounding its enactment, and the legislative history of Section 43 all demonstrate that Congress would not have granted DOL unfettered rulemaking authority without retaining a one-house veto. Under traditional severability analysis, these facts alone would mandate a finding of nonseverability. Only under the court of appeals' test were they not enough. That court also required proof that Congress would have preferred no employee protection plan at all to one lacking a legislative veto over DOL's exercise of the delegated authority, completely ignoring strong evidence that Congress would have preferred to enact something different (*e.g.*, a more specifically-defined EPP or a program authorization with other valid restrictions).

II. APPLYING ITS ERRONEOUS STANDARD, THE COURT OF APPEALS WRONGLY DISREGARDED DISPOSITIVE EVIDENCE DEMONSTRATING INSEVERABILITY.

In finding the legislative veto provision inseverable from the balance of Section 43, the district court properly utilized the full panoply of accepted tools of statutory construction to determine whether, in the absence of a legislative veto, Congress would have enacted the other portions of Section 43 in their present form. Judge Gesell examined the language and structure of the statutory

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[30] *Cf. Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 100 (1976) (White, J., concurring in part and dissenting in part) (severability "is *entirely* a question of the intent of the state legislature") (emphasis in original).

provisions,[31] the congressional purpose and scheme,[32] the legislative history,[33] and the role of Section 43 in the context of the entire Act.[34] *See* 594 F. Supp. at 95-96 (34a-37a). In so doing, the court identified critical facts demonstrating that Congress would not have delegated DOL rulemaking authority to implement this unprecedented employee protection program without incorporating a congressional review mechanism specifically designed to ensure that the program would be consistent with congressional purpose. *Id.*

On review, the court of appeals denied neither the accuracy of these critical facts nor their validity as indicators of the importance Congress placed on having a legislative veto provision in Section 43. *See, e.g.*, 766 F.2d at 1563 (25a). But because the D.C. Circuit's "exacting" standard looks not to the congressionally-perceived importance of the excised provision in the statutory structure but more generally to Congress' desire to legislate in an area, the court of appeals time after time brushed aside these compelling signals of congressional preference. *See, e.g., id.* (disregarding part of legislative history because it "does not speak to whether Congress would have preferred no employee protection plan at all"). *See also id.* at 1560 (17a-18a), 1561 (19a), 1564 (26a) and 1565 (28a). The proper, traditional analysis of legislative intent, however, shows that the legislative veto provision is inseverable from Section 43 because, although Congress undeniably wanted to provide some type of "insurance" for airline employees, it would not have enacted the EPP in its current form

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[31] *See, e.g., EEOC v. Hernando Bank, Inc.*, 724 F.2d 1188, 1190 (5th Cir. 1984).

[32] *See, e.g., Commissioner of Internal Revenue v. Engle*, 464 U.S. 206, 217-18 (1984).

[33] *See, e.g., EEOC v. CBS, Inc.*, 743 F.2d 969, 971 (2d Cir. 1984).

[34] *See, e.g., Richards v. United States*, 369 U.S. 1, 11 (1962).

without including the veto provision as an essential check on DOL's development of the program.

A. The Language And Structure Of The Statute Demonstrate That The Legislative Veto Was Integral To Section 43's Enactment.

When attempting to divine legislative intent concerning a statute, "one is to look first at [the statute's] language." *North Dakota v. United States*, 460 U.S. 300, 312 (1983); *see also Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Legislative intent that can be gleaned from a statute's "language must ordinarily be regarded as conclusive." *Id.* at 108. *See also Board of Governors of the Federal Reserve System v. Dimension Financial Corp.*, 106 S. Ct. 681, 686 (1986). And the statutory language relevant to determining legislative intent includes portions which have been found invalid:

> It is by a mere figure of speech that we say an unconstitutional provision of a statute is "stricken out." For all the purposes of construction, it is to be regarded as part of the act. The meaning of the legislature must be gathered from all they have said, . . . from that which is ineffectual for want of power, [as well] as from that which is authorized by law.

Davis v. Wallace, 257 U.S. 478, 484 (1922). The structure and language of the Deregulation Act, including the invalid veto provision, strongly indicate that the legislative veto was critical to the calculus that produced Section 43 and that without the veto, Congress would not likely have enacted the employment provisions as it did.

First, viewed in its entirety, the complex and comprehensive Deregulation Act grants or modifies at least 25 distinct delegations of regulatory authority, only one of which was made to DOL. Yet, only DOL's delegation to

implement the EPP was made subject to a legislative veto. The court of appeals found this isolated use of the veto irrelevant because it "still does not speak to whether Congress would have preferred no employee protection program at all." 766 F.2d at 1563 (25a).[35] But under the proper severability standard, this fact is highly relevant. This veto provision was not included simply to satisfy a congressional whim for widespread enactment of legislative veto provisions. As is discussed further below, the delegation to DOL was problematic because that department was not otherwise involved in airline deregulation and was not subject to oversight by the congressional committees responsible for the aviation industry. *See infra* at 38-39. That the DOL delegation was singled out for this treatment evinces a likelihood that Congress would not have enacted the balance of Section 43 as it did without that provision.

Comprehensive examination of the Deregulation Act also shows that Section 43 created a program fundamentally inconsistent with the overall deregulatory purpose manifest throughout the Act.[36] The Deregulation

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[35] The court of appeals also found the presence of a legislative veto in Section 43 to be "hardly surprising" because Section 43 is the only "regulatory provision" in an otherwise "deregulatory" statute. *See* 766 F.2d at 1563 (25a). The premise of this observation is plainly incorrect. It ignores the other 25 "regulatory" delegations which include: the CAB's duty to implement a program ensuring adequate air service to small communities (§ 33, 92 Stat. 1732); the CAB's authority to oversee and issue rules modifying an automatic entry program (§ 12, 92 Stat. 1716); the FAA's duty to establish certain aircraft safety standards (§ 5, 92 Stat. 1709, and § 33, 92 Stat. 1738); and the CAB's obligation, under revised procedures, to consider applications for route certifications (§ 7, 92 Stat. 1711, and § 8, 92 Stat. 1712).

[36] *See Kokoszka v. Belford*, 417 U.S. 642, 650 (1974) (noting that legislative intent analysis should include examination of an act's overall purpose); *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975) (same).

Act has the explicitly stated purpose of placing "maximum reliance on competitive market forces." 49 U.S.C. app. § 1302(a)(4) (1982). Yet, as the court of appeals noted but ignored, 766 F.2d at 1563 (25a), Section 43 stands in striking contrast. It hinders free competition by authorizing new regulations that would displace marketplace hiring decisions and impose costs and burdens on some airlines while exempting their competitors. Thus, recognizing that employee protection provisions were inconsistent with deregulation and could be "justified only in very special circumstances," Senate Report at 115, Congress had good reason to insist that DOL submit its regulations for review to ensure that the program would not thwart the Deregulation Act's overall purpose by overburdening covered carriers. Had Congress known that *Chadha* would render it unable to exercise this control over DOL's development of the program, it likely would have imposed further constraints on DOL's delegation to ensure that the Deregulation Act's basic purpose was not undermined.

Even stronger indications of legislative intent regarding severability come from the language and structure of Section 43 itself. Congress' perception that the legislative veto was integral to Section 43 and the EPP is self-evident from the congressional decision to incorporate the veto provision directly into subsection 43(f), the same provision granting the DOL delegation.[37] The surrounding language in subsection 43(f) also reflects the congressionally-perceived importance of the excised veto. Besides providing for the veto, subsection 43(f) requires that DOL (1) promulgate its regulations within six

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[37] In many statutes, the legislative veto provision is entirely separate from the delegation it governs. *See, e.g.*, Federal Elections Campaign Act, 2 U.S.C. § 438(d) (1982); Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9655 (1982); Energy Petroleum Allocation Act, 15 U.S.C. § 757(e)(3) (1982).

months, (2) submit its proposed rules to the House and Senate aviation oversight committees for a thirty legislative day review, and then (3) delay the effectiveness of its final regulations for a period of sixty legislative days during which they are subject to veto by either house. 49 U.S.C. app. § 1552(f)(2), (3) (1982). The legislative veto is thus inextricably intertwined with unusually detailed and mutually reinforcing restrictions on the specific grant of regulatory authority in subsection 43(f).

The court of appeals recognized that this legislative review provision "reflects, as a whole, a unique combination of features" among the almost 200 legislative veto provisions that Congress has placed in federal statutes. 766 F.2d at 1563 (25a).[38] Other statutes may have sixty-day one-house veto provisions, committee report-and-wait provisions, or regulatory deadlines. But in Section 43, Congress combined all three conditions to create

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[38] *See Chadha Hearings*, *supra*, at 24-72 (appended to statement of Hon. Edward Schmults, then Deputy Attorney General of the United States) ("DOJ Study"). The DOJ Study indicates that when the Deregulation Act was passed, Congress had enacted only a few statutes that imposed legislative vetoes on delegations of rulemaking authority, the agency function which most approximates legislative policy-making. *Id.* at 60-66. The highly-sensitive and often controversial subject matter of each of these laws strongly suggests that during the period when the Deregulation Act was considered, Congress did not impose a legislative veto on agency rulemaking in a routine or unthinking manner. Instead, Congress reserved such actions for matters it deemed politically controversial. *See, e.g.*, 20 U.S.C. § 246(a)(4) (1982) (1974 statute authorizing promulgation of certain guidelines relating to school desegregation); 15 U.S.C. § 1410(b) (1982) (1974 statute authorizing regulations requiring automobile passenger restraints other than seatbelts). Moreover, as important and controversial as the policies in these statutes were, Congress was generally content to include in each only a simple one-house or two-house veto, and did not include the elaborate oversight procedures and six-month deadline incorporated in Section 43.

a review procedure that ensured intimate congressional involvement in the development of the EPP. Again, however, the court below found this fact unpersuasive because it did not "speak to" the D.C. Circuit's view of "the issue at hand" (*i.e.*, whether "Congress, or even the committees involved, would have preferred no employee protection plan to the adopted plan divorced of its legislative veto provision"). 766 F.2d at 1564 (26a).

The three-part procedure obviously does not prove that "Congress would have preferred no employee protection plan at all." 766 F.2d at 1563 (25a). But it makes clear that Congress would not have granted DOL unfettered authority to issue regulations if it had known the veto provision was invalid. Further, it clearly shows that Congress went out of its way to construct for itself a review process that would provide maximum opportunity to revisit the issues left unresolved in the statute through a "sharing" of program development responsibility between the Executive and Congress. For example, the requirement that DOL submit draft EPP rules to the two aviation oversight committees gave those members of Congress directly responsible for formulating airline deregulation an opportunity to mold the details of the EPP.[39] The requirement that final regulations be

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[39] Contrary to the suggestion of the court of appeals, 766 F.2d at 1564 (25a), the effect of this provision is altered significantly by the removal of the legislative veto. As originally enacted, this was much more than a "report and wait" requirement because with the specter of a legislative veto in the background, DOL knew that its EPP proposals had to conform to the wishes of these committees. With the veto removed, Congress still must be informed about EPP proposals, but the provision is not an effective mechanism for ensuring DOL compliance with congressional policies. *See Chadha Hearings, supra,* at 109 (statement of Rep. Frank) ("[Y]ou can report and consult—and all that is nice and sometimes it is very useful—but the fact is that [the agency] still would have the power to [act] and we couldn't do anything about it.").

promulgated within six months guaranteed that the regulations would be reviewed by essentially the same members of Congress who, through their positions on the aviation committees, shaped the Deregulation Act and understood congressional intent concerning the EPP. Finally, the provision subjecting the final regulations to potential veto for sixty legislative days (*i.e.*, days on which both houses of Congress are in session) gave the two committees a means of presenting their recommendations to each house as a whole, thereby ensuring that DOL would take seriously congressional views expressed during the comment period. Thus, while Congress wanted the program developed quickly, it preserved a substantial amount of the available time for its own participation. These elaborate provisions were intended to establish a partnership between Congress and DOL in shaping the contours of the EPP, which were left vague and ambiguous in Section 43.

This unique congressional review process was critical because Congress was acutely aware that Section 43 authorized a program that was significantly more pervasive than any labor protections previously enacted. EPPs in other statutes had dealt with specific companies, workers, route terminations, and employment dislocations that were a direct result of some private transaction or government approval. *Regulatory Reform in Air Transportation: Hearings Before the Subcomm. on Aviation of the Senate Comm. on Commerce, Science and Transportation*, 95th Cong., 1st Sess. 709 (1977) (*"Senate Hearings"*) (statement of Robert E. Ginther, Committee staff member).[40] But in Section 43, Congress

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[40] *See, e.g.*, Rail Passenger Service Act, 45 U.S.C. § 565(b) (1982) (railroad should provide "protective arrangements" to employees terminated as a result of a route termination); Interstate Commerce Act, 49 U.S.C. § 11347 (1982) (railroad merger approval subject to surviving carriers providing "fair arrangement" for employees of acquired carrier); Redwood National Park Expansion Act of 1978, Pub. L. No. 95-250, 92 Stat. 163 (1978) (as to em-

was proposing for the first time an unemployment insurance plan coupled with a system of generous employee re-hire rights that addressed not just "individual firms or individual employees, but rather, the general regulatory structure [encompassing] all of the areas and all the workers in the industry." *Id.* *See also* Senate Report at 208 (Additional Views of Sen. Zorinsky) (characterizing Section 43 as "new and without precedent").

B. The Legislative History Demonstrates That The Veto Was An Essential Restriction On The Regulatory Authority Granted To DOL.

1. *Congress' Uncertainty Over The Effects Of Deregulation On Employment Made Congressional Review A Critical Part Of Section 43.*

As the court of appeals observed, "statements in the legislative history reasonably can be read as evidencing a sense that employee protection was not in fact vital to the crafting of a comprehensive deregulatory regime." 766 F.2d at 1562 (21a). Indeed, most of the airline deregulation proposals introduced in Congress did not contain any employee protection provisions,[41] principally

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ployees in two California counties displaced by forestry policy changes, DOL authorized to make arrangements so that displaced employees would be given full consideration for certain government-related and private sector jobs and be provided certain financial benefits); Milwaukee Railroad Restructuring Act, 45 U.S.C. § 907 (1982); Rock Island Transition and Employee Assistance Act, 45 U.S.C. § 1004 (1982); Northeast Rail Service Act of 1981, 45 U.S.C. § 797b (1982).

[41] Beginning in October 1975, seven Senate and ten House bills concerning airline deregulation were introduced in Congress. Of the seven Senate proposals, only the last, S. 2493, contained a comprehensive employee protection plan. On the House side, an EPP did not appear until H.R. 8813, the sixth deregulation bill introduced in that chamber. Three bills subsequently introduced in the House contained no EPP, but the final bill, H.R. 12611, required labor protection similar to that provided in Section 5(2)(f) of the

because the sponsors of deregulation either did not perceive a likelihood of employment reductions or felt that any reductions would be covered adequately by the CAB's existing labor protection authority. *See, e.g., Senate Hearings* at 1847 (statement of Sen. Cannon, Chairman of the Senate Subcomm. on Aviation). Labor protection provisions, however, eventually were added to two of the final deregulation bills introduced in the House. *See* H.R. 8813, 95th Cong., 1st Sess. § 27 (1977); H.R. 12611, 95th Cong., 2d Sess. § 32 (1978). An industry-wide EPP was not proposed in the Senate until its final deregulation bill was introduced in 1978. *See* S. 2493, 95th Cong., 2d Sess. § 22 (1978).

Many members of Congress doubted the need for labor protection, predicting that deregulation would increase airline industry employment. *See, e.g.*, 124 Cong. Rec. S5879 (daily ed. Apr. 19, 1978) (statement of Sen. Cannon) ("I believe we have a bill here which will insure that we will end up with more employees for these various carriers rather than fewer, and that will be true right across the board."); 124 Cong. Rec. S18,798 (daily ed. Oct. 14, 1978) (statement of Sen. Kennedy) ("[T]he indicators are all positive, and employment will continue to increase as the carriers respond to the changes

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Interstate Commerce Act and Section 405 of the Rail Passenger Service Act. *See generally* S. 2551, 94th Cong., 1st Sess. (1975); S. 3536, 94th Cong., 2d Sess. (1976); S. 3830, 94th Cong., 2d Sess. (1976); S. 292, 95th Cong., 1st Sess. (1977); S. 689, 95th Cong., 1st Sess. (1977); S. 2493, 95th Cong., 2d Sess. (1978); H.R. 10261, 94th Cong., 1st Sess. (1975); H.R. 13504, 94th Cong., 2d Sess. (1976); H.R. 13742, 94th Cong., 2d Sess. (1976); H.R. 14330, 94th Cong., 2d Sess. (1976); H.R. 14604, 94th Cong., 2d Sess. (1976); H.R. 8813, 95th Cong., 1st Sess. (1977); H.R. 9297, 95th Cong., 1st Sess. (1977); H.R. 9588, 95th Cong., 1st Sess. (1977); H.R. 11145, 95th Cong., 2d Sess. (1978); H.R. 12611, 95th Cong., 2d Sess. (1978). *Cf.* S. 3364, 94th Cong., 2d Sess. (1976) (proposed codification of CAB's existing authority to impose labor protection when approving individual actions of carriers such as mergers and acquisitions).

and new oppportunities deregulation has brought.").[42] Others expressed general uncertainty over deregulation's effects or foresaw dire consequences. *See, e.g., Aviation Regulatory Reform: Hearings Before the Subcomm. on Aviation of the House Comm. on Public Works and Transportation*, 95th Cong., 1st Sess. 1034 (1977) ("*House Hearings*") (statement of Rep. Anderson) ("[O]ur action . . . is going to make more jobs and stimulate the industry, but I cannot prove that. And it may not."). *See also* Senate Report at 206 (Additional Views of Sen. Zorinsky).[43]

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[42] These members of Congress proved to be correct. Deregulation has not led to reductions in airline employment, *see* S. Morrison and C. Winston, *The Economic Effects of Airline Deregulation* 44 (Brookings Inst. 1986), and findings by the CAB and DOT suggest that most, if not all, layoffs have been attributable to factors other than deregulation, such as the firing of striking air traffic controllers in 1981, the reduction in air travel during economic recessions, and periods of increased fuel costs. *See, e.g., In re Application of AeroAmerica*, Docket No. 38885 (C.A.B. Apr. 7, 1983) C.A.B. Order No. 83-4-36 at 9-10; *id.*, Comments of the Department of Transportation in the AeroAmerica proceeding (Sept. 3, 1982).

[43] *See also House Hearings* at 1224 (statement of John J. O'Donnell, President, ALPA) ("Because the practical consequences of deregulation are so uncertain, it is difficult to predict with much precision what the impact on airline employees might be."). Although some members of Congress were willing to hazard guesses as to general employment trends after deregulation, none offered to quantify the magnitude of those trends:

> No proponent of [the Senate bill] has been able to accurately estimate how many jobs will be terminated by the full implementation of this legislation . . . [T]he fact is that [the bill's sponsors] do not know—and there is no data available—to determine the full adverse effect of this legislation upon the Nation's airline employees. . . . It is a sad commentary on this bill when we find ourselves providing unemployment benefits for an unknown number of people, in an amount that we cannot quantify. . . .

124 Cong. Rec. S5863 (daily ed. Apr. 19, 1978) (statement of Sen. McGovern).

Reflecting the prevalent uncertainty, the Senate report could conclude only that there was a "theoretical possibility" of "potential" employment reductions of a "temporary" and "transitional" nature. Senate Report at 113, 115. Although Congress believed that the Deregulation Act would "increase the total number of jobs in the airline industry," Senate Report at 113, and would necessarily entail expanded overall employment opportunities for airline employees, it could not be absolutely certain of this result. Section 43 was therefore explained by the Chairman of the Senate Aviation Subcommittee as an "insurance" policy against job contractions. 124 Cong. Rec. S5879 (daily ed. Apr. 19, 1978) (statement of Sen. Cannon).

Because of these uncertainties and the substantial differences of opinion about the extent and type of employee protection needed, Congress left open many fundamental issues for subsequent resolution through administrative action subject to congressional review. These issues included the level of assistance payments for pilots,[44] mechanics, secretaries, accountants and other employment categories, *see* Senate Report at 116-17, and virtually all aspects of the duty-to-hire program, including what constitutes an "occupational specialty," how DOL's nationwide hiring program would operate, what showing would be required to qualify for the hiring preferences, and how conflicts should be resolved between the duty to hire and other legal hiring duties of the airlines (*e.g.*, equal employment opportunity obligations and safety-related job qualification requirements).[45] *See supra* at 30, 32, 33.

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[44] *See* 124 Cong. Rec. S5877 (daily ed. Apr. 19, 1978) (statement of Sen. Zorinsky) (expressing concern that a pilot could receive government assistance up to $100,000 annually under the EPP). *See also* 124 Cong. Rec. H13,448 (daily ed. Oct. 14, 1978) (statement of Rep. Mineta).

[45] Section 43 left numerous other questions unanswered. *See generally Effects of Airline Deregulation; and Legislation to Ad-*

Congress' concerns about the EPP were heightened by its decision to authorize DOL (as opposed to another agency) to resolve these open issues and implement the program. The initial House proposal would have delegated employee protection authority to the Department of Transportation which, together with the Civil Aeronautics Board, was generally responsible for implementing the Act. *See* H.R. 8813, 95th Cong., 1st Sess. (1977). Labor representatives, however, insisted that DOL, which was not otherwise to be involved in airline deregulation, administer the program. *See, e.g., House Hearings* at 1569-70 (statement of William G. Mahoney, counsel for four labor unions); *id.* at 1588 (statement of John J. O'Donnell, President, ALPA). The principal architects of the Deregulation Act—the Senate Committee on Commerce, Science and Transportation and the House Committee on Public Works and Transportation—had little experience with DOL and lacked general jurisdiction over its programs, authorizations, appointments, and appropriations. The committees recognized that the Secretary of Transportation and the Chairman of the CAB were strong advocates of deregulation, *see* 124 Cong. Rec. S18,798 (daily ed. Oct. 14, 1978) (statement of Sen. Pearson), but they could not presume that DOL would be knowledgeable or even sympathetic to the objectives of the Deregulation Act.[46] Thus, when the Sen-

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vance the Date for Sunset of the Civil Aeronautics Board: Hearings Before the Subcomm. on Aviation of the House Comm. on Public Works and Transportation, 97th Cong., 1st Sess. 735 (1981) ("*Sunset Hearings*") (statement of Gary Green, Director of Legal Department, ALPA) (Section 43 was a "leaky lifeboat" that contained "a lot of reservations in it, a lot of hitches, a lot of administrative qualifications, a lot of problems").

[46] Rep. Anderson, discussing H.R. 8813, emphasized the crucial role that the House had originally envisioned giving the Secretary of Transportation in developing an EPP from that bill's broad delegation of authority:

> [W]e put this in there kind of directing the Secretary of Transportation, Brock Adams . . . and we instructed him to study

ate bill transferred control over the EPP to DOL, the legislative veto was added as a check.

2. *The Conference Committee Compromise Strengthened The Significance Of The Veto.*

The Conference Committee's actions are strong evidence that Congress considered the veto provision an "integral" part of Section 43. 594 F. Supp. at 95 (34a). In the House and Senate bills, the Conference Committee faced two entirely different concepts of labor protection. The final House bill adopted the more traditional approach used in previous legislation concerning transportation industries:

> No authority granted by this Act . . . shall be exercised by any carrier unless prior to each such exercise, the Secretary of Labor has certified to the Civil Aeronautics Board that the interests of the employees who may be affected thereby have been adequately protected by fair and equitable arrangements providing levels of protection no less beneficial to and protective of such interests than those established pursuant to section 5(2)(f) of the Interstate Commerce Act and section 405 of the Rail Passenger Service Act . . . .[47]

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this area so that there can be protections if there is going to be any problem; and we did leave it very broad, very loose. We started out with more rigid, tighter provisions [but] we know we are dealing with Brock Adams.

House Hearings at 1022 (1977).

[47] Section 5(2)(f) of the Interstate Commerce Act directs the Interstate Commerce Commission to ensure that rail carriers provide protective arrangements for employees who are terminated as a result of individual railroad mergers or consolidations. 49 U.S.C. § 11347 (1982). Section 405 of the Rail Passenger Service Act requires rail carriers to protect employees who are adversely affected by the discontinuance of an intercity passenger route. 45 U.S.C. § 565 (1982).

H.R. 12611, 95th Cong., 2d Sess. § 32 (1978).[48] *See also* H.R. 8813, 95th Cong., 1st Sess. § 27 (1977) (predecessor bill containing similar language).

Meanwhile, the Senate bill created an entirely new concept of employee protection, providing that if a carrier suffered a "qualifying dislocation"—*i.e.*, bankruptcy or a 15% work force reduction occurring as a result of deregulation—its "protected employees" who were furloughed or terminated would be entitled to certain government compensation and the "first right of hire" by other carriers as determined by the Secretary of Labor. S. 2493, 95th Cong., 2d Sess. § 22 (1978). Section 22(f) of the Senate bill authorized DOL to issue regulations creating a formula for the assistance payments and implementing the duty-to-hire program, and provided that such regulations would be subject to a one-house legislative veto.[49] *See* Senate Report at 202-03; *id.* at 116.

The Conference Committee adopted the Senate approach with two important substantive modifications.

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[48] The House bill also provided that the employer would be reimbursed by the government for the cost of any protective arrangements provided to its employees. H.R. 12611, § 32.

[49] The court of appeals suggested that the veto may have been intended solely as a check on the government compensation part of Section 43. *See* 766 F.2d at 1562 (22a-23a). The overwhelming evidence shows, however, that Congress intended the compensation and duty-to-hire provisions to operate in tandem as a single program subject to extensive congressional oversight. *See, e.g.*, S. 2493, 95th Cong., 2d Sess. § 22(a), (b), (d) (1978) (compensation and duty-to-hire both triggered by finding of "qualifying dislocation"); Senate Report at 116 (emphasizing that the "interaction" of the duty-to-hire and compensation provisions would hold down the overall cost of the program); 124 Cong. Rec. S5876, S5885 (daily ed. Apr. 19, 1978) (proposed amendment that would delete compensation provision defeated). In fact, one proposed EPP included a veto provision applicable exclusively to the regulations implementing the duty-to-hire part of the program. *See* Senate Report at 208-09 (Additional Views of Sen. Zorinsky).

H.R. Rep. No. 1779, 95th Cong., 2d Sess. 105 (1978) ("Conference Report"). First, the threshold for a "qualifying dislocation" was cut in half from 15% to 7½%. *Id.* Second, the "qualifying dislocation" requirement as a prerequisite for the right of first hire was eliminated, thus leaving unclear Congress' intent as to the circumstances under which employees adversely affected by the Deregulation Act would be eligible for the mandatory hiring preference. *Id.*[50]

The effect of the Conference Committee's compromise was thus to provide less guidance to DOL regarding the duty-to-hire authority. But the Conference simultaneously provided for increased congressional scrutiny of DOL's regulations. The Senate bill had provided for only a sixty-day legislative veto period before both houses of Congress. *See* S. 2493, 95th Cong., 2d Sess. § 22 (1978). The Conference expanded this review by adding the thirty-day committee submission requirement and the six-month deadline which, as discussed previously, combined with the one-house veto to guarantee that the members of Congress who had charted the path of airline deregulation could return to the issues they had left unresolved in the conference sessions.

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[50] *See Sunset Hearings* at 94 (statement of Rep. Levitas) ("[T]here is, as I am sure you are well aware, a great deal of dispute even within the Congress today as to what [the duty-to-hire] section means. . . ."). The district court on remand in this case has ruled that DOL did not unreasonably interpret Section 43 as extending the duty-to-hire right even to employees terminated for reasons completely unrelated to deregulation. *Alaska Airlines, Inc. v. Brock*, No. 84-0485, slip op. at 4-10 (D.D.C. Jan. 22, 1986). Yet Congress consistently stated that the hiring preference was available only to employees who were adversely affected by the legislation. *See, e.g.*, Senate Report at 113; H.R. Rep. No. 1211, 95th Cong., 2d Sess. 22 (1978). *See also Sunset Hearings* at 94 (statement by Rep. Levitas) (the duty to hire was intended to apply "only in the case of a layoff resulting from deregulation"). This issue is now on appeal to the D.C. Circuit.

While the Conference Committee strengthened congressional oversight of the Section 43 delegation to DOL, it simultaneously deleted its entire veto capability concerning the "automatic entry program," described as one of the most "controversial" provisions in the entire Act. *See* 124 Cong. Rec. S5852 (daily ed. Apr. 19, 1978) (statement of Sen. Pearson). The Senate bill gave the CAB certain "emergency" powers over that program, subject to a sixty legislative day one-house veto provision.[51] S. 2493, 95th Cong., 2d Sess. § 5 (1978) (proposed amendment to § 401(k)(11) of the FAAct).[52] The legislative veto provision concerning this delegation was removed in Conference, *see* 49 U.S.C. app. § 1371(d)(7)(D) (1982), leaving Section 43 subject to the only legislative veto in the entire Act. Thus, Congress made sparing and discriminating use of the veto in the Deregulation Act.

The court of appeals noted the sparse discussion of the veto provision after the Conference Report. *See* 766 F.2d at 1562-63 (23a-24a). Although the Section 43 labor protection provision was "very controversial" in Conference, 124 Cong. Rec. H13,446 (daily ed. Oct. 14, 1978) (statement of Rep. Harsha), the veto provision was not, and this silence is therefore understandable. Since the

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[51] The program gave airlines limited freedom to add and subtract routes without CAB approval, and the Senate bill authorized the CAB to modify the program under certain circumstances.

[52] The Senate Report suggests that the legislative veto provision in the automatic entry program was specifically inserted in S. 2493 out of a concern that the CAB might exercise its authority to frustrate the deregulatory purpose of the program:

> Again, *recognizing the extraordinary nature of this Board power and the firm commitment of the Committee to institute an automatic entry program,* any proposed Board modification must be submitted to the Congress prior to its proposed effective date and will not become effective if either House adopts a resolution disapproving such a regulation.

Senate Report at 67 (emphasis added).

House EPP approach was long established in other regulated transportation industries, *see supra* at 33-34, 39, the House evidently did not believe that a veto was needed for this well-established type of EPP. By contrast, the duty-to-hire and compensation schemes incorporated in the Senate bill created unprecedented, wide-ranging obligations, constituting a more controversial intrusion into the labor market. The only non-controversial element of the Senate approach was the veto provision, which was included in the Committee bill and every floor amendment. *See* 124 Cong. Rec. S5876 (daily ed. Apr. 19, 1978) (amendment by Sen. Zorinsky); *id.* at S5882 (amendment by Sen. Danforth). There was no disagreement in either the Senate or the House that the legislative veto was essential to the Senate approach to labor protection, which ultimately was adopted.

In persuading a skeptical House to acquiesce in the Senate's approach to labor protection,[53] Rep. Levitas, one of the principal architects of the Deregulation Act, emphasized the importance of the legislative veto, stressing that "this piece of legislation contains a one-House veto over the regulations which may be issued by the Secretary of Labor on the labor protection provisions, so that

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[53] The court of appeals failed to perceive the critical difference between the House and Senate bills. While some members of Congress did consider the House bill "stronger" than the Senate EPP, *see* 766 F.2d at 1565 (28a), because it provided assistance payments to every employee who could prove he was adversely affected by a specific action authorized by the Deregulation Act (*e.g.*, a route termination or merger) without requiring a 15% reduction in his employer's total work force, the veto was included in the Senate bill for other reasons. With its industry-wide duty-to-hire program that was not tied to specific actions of employers and its open-ended government assistance plan that provided no guidance to DOL on the levels of payment, the Senate bill presented an employee assistance package unprecedented in design and scope. *See supra* at 33-34. The veto therefore was necessary because Section 43 was unique and untested, not because it was stronger or weaker than the EPP proposed by the House.

the Congress and not an unelected bureaucrat will have the final word on the regulations that will have the effect of law." [54] 124 Cong. Rec. H13,448 (daily ed. Oct. 14, 1978). Given that Section 43 was but one small part of a major piece of legislation, and that the House and Senate agreed that the veto was an absolutely necessary adjunct to the Senate bill's delegation of authority to DOL, it is hardly surprising that the veto was not the subject of lengthy debate.

By strengthening the Section 43 veto in Conference, and at the same time removing a veto provision from a section that was at least as controversial as Section 43, Congress unmistakably demonstrated its serious reservations about the regulatory authority delegated to DOL. While the Conference compromise admittedly does not prove that Congress would have rejected all labor protection provisions had it not been able to veto DOL's regulations, *see* 766 F.2d at 1564 (26a), it is strong evidence that absent the veto provision, Congress would not have adopted the unfamiliar Senate version in the form it did, granting DOL broad authority to create a new type of EPP with completely unknown effects.

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[54] The court of appeals sought to discount Rep. Levitas' comments because he was a "vigorous advocate" of the legislative veto. 766 F.2d at 1563 (23a). But Rep. Levitas was hardly a single-issue onlooker; he introduced several bills on airline deregulation, sponsored the final House bill, actively participated in the House Aviation Subcommittee's review and report on the Deregulation Act, and was a House member on the Act's Conference Committee. *See* Conference Report at 52. In short, for purposes of any legislative history analysis, he was a key player. *See Federal Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976) ("a statement of one of the legislation's sponsors . . . deserves to be accorded substantial weight in interpreting the statute"). Moreover, if anything, the importance he generally placed on legislative veto provisions should lend additional weight to his comments on the Deregulation Act. *Cf. Daniel v. Paul*, 395 U.S. 298, 306-07 (1969) (relying on floor comments of Sen. Humphrey as a vigorous advocate of racial equality to interpret provisions of the Civil Rights Act of 1964).

CONCLUSION

Congress may have been unsure about the need for an EPP and may not have addressed the details of its implementation, but one thing was certain: Congress emphatically wished to reserve for itself ultimate authority over the manner in which DOL implemented the program. Had Congress known that it would be unable to control the EPP's destiny through the veto power, it would have been compelled to confront the questions it deliberately left unanswered, rather than delegate that responsibility. The result, in all probability, would have been a different type of employee protection program (*e.g.*, the traditional form adopted by the House), a program providing additional guidance to DOL on many issues (*e.g.*, the extent of the hiring duty, the levels of compensation and the reconciliation of conflicting safety and civil rights obligations), or a program administered by an agency (*e.g.*, DOT) more in step with the Act's deregulatory purpose. Under the *Champlin Refining* standard, the invalid legislative veto provision in Section 43 of the Deregulation Act is thus inseverable, and the entire section should be stricken.

For all of the foregoing reasons, petitioners respectfully submit that the decision of the court of appeals should be reversed.

Respectfully submitted,

WILLIAM T. COLEMAN, JR.
Counsel of Record
DONALD T. BLISS
JOHN H. BEISNER
REBECCA K. TROTH
JAMES P. NEHF
O'MELVENY & MYERS
1800 M Street, N.W.
Washington, D.C. 20036
(202) 457-5325

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